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422099—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

KAY MANUFACTURING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled case on August 5, 1941.

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 36–37) is unreported. The opinion of the Circuit Court of Appeals (R. 61–64) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 5, 1941 (R. 60). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1936 taxpayer corporation made a liquidating distribution of earned surplus to its parent corporation, which resulted in no taxable gain or loss to the parent because of Section 112 (b) (6) of the Revenue Act of 1936. For the purpose of computing undistributed profits surtax, is taxpayer entitled to a dividends-paid credit under Section 27 (f), of the Revenue Act of 1936?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix to the petition for a writ of certiorari in *Helvering* v. *Credit Alliance Corporation,* No. —, present term, which is being filed together with this petition.

STATEMENT

The facts were stipulated (R. 19–35) and found by the Board of Tax Appeals as stipulated (R. 36–37). They may be summarized as follows:

Taxpayer corporation (Kay Manufacturing Corporation of Massachusetts) was organized in Massachusetts in 1933 and dissolved in 1940. In

1936 Kay Manufacturing Corporation of New York owned all of taxpayer's outstanding shares. Pursuant to resolutions duly adopted by taxpayer's stockholders and directors, all of taxpayer's assets were distributed in 1936 to its parent by way of liquidation. At that time, taxpayer had an earned surplus of $47,904.23. (R. 19–22, 31–34.)

Contrary to the determination of the Commissioner, the Board of Tax Appeals and the Circuit Court of Appeals have held that, although the distribution was tax-free to Kay Manufacturing Corporation of New York by reason of Section 112 (b) (6) of the Revenue Act of 1936, nevertheless taxpayer corporation was entitled to a dividends paid credit under Section 27 (f) of the 1936 Act, to the extent that the distribution received by Kay Manufacturing Corporation of New York represented earned surplus of the taxpayer. (R. 37, 60.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that taxpayer corporation was entitled, under Section 27 (f) of the Revenue Act of 1936, to a dividends paid credit for a tax-free liquidating distribution to its parent corporation.

REASONS FOR GRANTING THE WRIT

This case presents the same question as that involved in *Helvering* v. *Credit Alliance Corp.* (C. C.

A. 4th), decided July 21, 1941, not yet officially reported but found in 1941 C. C. H., Vol. 4, par. 9639, in which the Government is filing a petition for certiorari together with this petition. A writ of certiorari should issue in the instant case for the reasons set forth in the petition in the *Credit Alliance* case.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

OCTOBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941